No. 15920

United States
Court of Appeals
For the Ninth Circuit

EINAR GLASER and DOROTHY GLASER,

Appellants,

vs.

MARGUERITE L. CONNELL,

Appellee,

WILLIAM F. WHITE and JANET D. WHITE,

Defendants.

Brief of Appellants

Appeal from the United States District Court for the Western District of Washington, Northern Division.

HON. GEO. H. BOLDT, Judge

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WATSON PRINTING COMPANY - PORTLAND, OREGON

SUBJECT INDEX

TABLE OF CASES

TEXTS, STATUTES AND RULES

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STATEMENT OF JURISDICTION

Jurisdiction of the United States District Court for the Western District of Washington, Northern Division, is based on Title 28, USCA, Sec. 1332 (Diversity of Citizenship). The complaint alleges that appellants are residents and citizens of the State of Oregon; that appellee Marguerite L. Connell is a resident and citizen of the State of Washington; that defendants William F.

White and his wife, Janet D. White, are residents and citizens of the State of Oregon, and that the matter in controversy exceeds exclusive of interest and costs, the sum of $3,000.00 (Tr. 3-4). These allegations are admitted.

The jurisdiction of this Court is based on Title 28, USCA, Sec. 1291.

STATEMENT OF THE CASE

This appeal involves a suit to foreclose a real property mortgage, dated July 12, 1950, but executed and delivered July or August, 1951.

Appellee, is the owner of the real property. She executed and delivered a promissory note to the order of Holdorf Oyster Corporation for $16,000.00, due five years thereafter with interest at 6% per annum, and as security she executed and delivered a real estate mortgage which was filed for record on August 14, 1951.

By the pre-trial order, it is admitted (Tr. 4) that the note and mortgage were procured by fraud practiced by Holdorf Oyster Corporation, the original payee and mortgagee, Dwight Holdorf, E. R. Errion, and others, and it is also admitted that Holdorf Oyster Corporation was the alter ego of Errion.

Errion, who has operated in the northwest for the

past 10 years, is reputed to be the cleverest bunco man of his day.

On August 8, 1951, for $16,000 paid by appellants, Holdorf Oyster Corporation sold, transferred and delivered said promissory note and assigned the mortgage to appellants and ever since said date appellants are the owners and holders thereof. (Tr. 4-5). Appellants acquired the note and mortgage on payment of $16,000 without knowledge of the acts and conduct practiced by Holdorf Oyster Corporation, Dwight Holdorf, Errion, and others (Tr. 5).

Appellants prayed for a judgment against appellee for the sum of $16,000 with interest, attorney's fees and costs, and for a decree of foreclosure of said mortgage.

Findings of fact and conclusions of law were entered, inter alia (Tr. 19-20), that appellants exercised complete indifference and neglect and did not act in good faith at the time they purchased said note and mortgage and paid $16,000 to Holdorf Oyster Corporation; that appellants relied upon other transactions with Errion and not said mortgage to secure the repayment thereof. Further, that appellants knew the note was in default as to the payment of the first year's interest; that appellants made no inquiry or investigation as to title, taxes or ability of appellee to pay said note; that

Errion fraudulently misrepresented said note and mortgage to appellants by representing it was a valid note and mortgage, knowing at the time he had obtained the same by fraud; that appellee at no time conducted herself by any acts or omissions so as to mislead or prejudice appellants as would estop her from asserting as a defense to the said note and mortgage the fraud practiced by Errion, but that she was negligent in executing the note and mortgage and delivering the same to Errion.

A judgment was entered dismissing the complaint and declaring the note and mortgage invalid and void as a lien against the real property.

Errion, a Fabulous Rascal

Prior to 1949 appellee owned various real properties and securities and other personal property, (Tr. 36) and these are the properties plucked from her by Errion. In his long career as a confidence man his victims were mulcted of many thousands of dollars. He is no stranger to appellate courts.

Errion, et al v. Connell, 236 F. 2d, 447,

McKenney, et ux. v. Buffelen Manufacturing Co., 232 F. 2d, 5,

Glaser et ux v. Connell, 47 Wn. 2d, 622, 289 P. 2d 364,

Duniway v. Barton, 193 Or. 69, 237 P. 2d 930.

Facts Relating to the Execution and Delivery of Note and Mortgage by Appellee

In 1949 Errion was introduced to appellee as being a real estate agent, tax expert, promoter par excellence, and she sought his services. (Tr. 37).

As part of a swindle, she conveyed to Holdorf Oyster Corporation, one of Errion's many corporations, the real property at issue in this case (Tr. 39). Between that period and July, 1951, she was in constant contact with him and his cohorts (Tr. 40), first trying to get some money, then demanding it, in connection with his many unfulfilled and exasperating promises to her.

She told him she badly needed $20,000 to purchase another home (Tr. 41).

Errion represented he had a potential buyer for the property involved in this case and reached an agreement with appellee whereby he would direct Holdorf Oyster Corporation to convey the property back to her, contingent upon appellee executing a note and mortgage to it for $16,000 (Tr. 44), it being understood she was to have $20,000 from the proceeds of the anticipated sale and Errion was to receive $16,000 for his services. This note and mortgage are the subject matter of this case.

Sometime in July or August, 1951, appellee went to

Portland to complete the transaction. She rebelled in signing the note and mortgage and pointed out she had no money and could not pay the same when it would become due (Tr. 47-50).

Errion assured her the property was practically sold and within two months she would have her money. She noticed the $16,000 note and mortgage were dated back one year to July, 1950 which aroused her curiosity, but Errion pacified her with an alluring explanation. She realized however, it was improper to sign the note when it was predated, but did so reluctantly (Tr. 47).

Prior to July, 1951 (Tr. 50) many conferences were had with Errion about money matters. She began to have serious doubts and suspicions which arose by reason of previous questionable transactions (Tr. 51).

She was well aware, however, at the time she executed the note and mortgage that if the anticipated sale of the house was not consummated, the mortgage debt would be hers and she could lose the property (Tr. 53-54).

(Tr. 47)

"There were four, five people around, a secretary, and old Mr. Davenport who was ready to put a stamp on something, and anyhow they had a lot of papers around, and I suppose I did—anyway, he volunteered to take care of this property, and I was to get it back in my name, and so he put this

paper in front of me, and I said, "What does it mean?" I said, "You know I have no money. I can't pay for this $16,000." He was asking me to sign a note. I have always been afraid of notes that borrow on interest, six per cent, five or six percent. I said, "You know I can't pay for this. Suppose something happens? This man doesn't buy this property." He said, "Oh, you have five years, but that shouldn't happen. It will be taken care of. Within two months, at least, you will have your money. Then you go on and buy this house." I said, "Why don't you sell it?" I think you have repeated that. I don't need to tell that over and over again—he said, "Because it would be better if it came from you as an individual," and I said, "Is there anything wrong about this thing?" He said, No. This sort of thing is done every day by businessmen," and after I signed it, and they endorsed, or whatever it is, they stamped it. **I had read it through,** but I happened to glance at the date above which I hadn't paid any attention to, and it was dated one year before, and I made quite a fuss about that . . .

(Tr. 48)

A. Well, I didn't think it was right in the first place. I would be paying interest. If anything happened to that—I had a little sense. I didn't have much. I had enough to know I might have to pay this interest. I didn't see why I should pay a whole year's interest when I hadn't the thing in my hand until this moment which was in '51, I think. He had dated it back to '50, and I made a howl about it.

She testified that by **January, 1951,** at least, she had

absolutely no reason to doubt that Errion, Holdorf, and their whole crowd were confidence men. (Tr. 66).

The Purchase of the Note and Mortgage by Appellants

Operating in the timber of Tillamook County, Oregon during the years 1948 to 1951 and prior thereto, was a logging partnership known as McKenney Logging Company which consisted of Bart McKenney and his wife, Marie McKenney and the appellants Glasers. They were desirous of dissolving their partnership and selling the assets and had set a price around a million three or four hundred thousand dollars (Tr. 77).

They fell into the hands of the Master of Chicanery, Errion, and he, as stated by Judge Chambers, . . . "seems to have led them to the point of no return and into a world of woe," . . . 232 **Fed.** (2) 5. **McKenney v. Buffelin Mfg. Co.**

In the course of Errion's machinations as a broker for McKenney Logging Company, and at the same time representing appellee, he advised appellants he was temporarily short of funds and wanted a loan and would give some security.

In August, 1951, Errion represented he had some obligations to meet and would like to pledge a note and mortgage he owned for the face amount of $16,000 (Tr. 81-88). He importuned appellants to give him

$16,000 through the Holdorf Oyster Corporation and as security to receive an assignment of the note and mortgage theretofore executed by appellee.

Appellants made no inquiry as to how he happened to have possession of appellee's $16,000 note and mortgage but like many of his victims, were impressed with his integrity and were mesmerized into a sense of security. They gave him $16,000.

In entering judgment in the lower court, **Errion et al v. Connell,** 236 **Fed** (2) 447, Judge Lindberg described Errion as a "fantastic person endowed with great facilities of persuasion, a magnetic personality and an irresistable charm."

Note and Mortgage Subject of Prior Litigation

Appellée in 1953, brought an action in the United State District Court for the Western Division of Washington, Northern Division, Case No. 3556, against Errion and others, including appellants, charging all with fraud and seeking damages together with a prayer for the cancellation of certain instruments, including the within note and mortgage. **Errion et al v. Connell,** 236 F. 2d 447. (Exhibit 4, Tr. 8).

Appellee obtained a judgment against Errion and others for a total amount of $83,077.49.

After trial the said action was dismissed as to these appellants.

In determining the amount of the aforesaid judgment, the court considered the note and mortgage at issue in this case as a valid and existing obligation owing and outstanding by appellee in so far as appellants herein were concerned and allowed appellee in the judgment full credit for the amount thereof, to-wit: $16,000.00 plus interest of $4,314.68 (Pl. Exh. 4, Tr. 8-21).

Appellants had filed an action in the Superior Court, State of Washington, against appellee to foreclose the mortgage. The trial court held that appellants were not holders in due course because there had been no valid endorsement of the note. The action was dismissed without prejudice. The case was affirmed on appeal. **Glaser et ux v. Connell,** 47 Wn. (2) 622, 289 P. (2) 364.

Specification of Errors

1. The findings of fact and conclusions of law are against the clear weight of the evidence and were induced by an erroneous view of the law.

2. The court erred in not finding that the judgment in Case No. 3556, which was thereafter appealed to the Court of Appeal, No. 14797, Exhibit 4, is res judicata and estops appellee from relitigating similar issues in this case.

3. The court erred in not finding that appellee is

estopped from claiming the note and mortgage are not valid obligations, for the reason, in Case No. 3556, the court considered the note and mortgage as a valid and existing obligation owing by appellee in so far as appellants were concerned, and in said Case No. 3556, rendered a judgment by way of pecuniary restitution, allowing appellee full credit for the amount of the note and mortgage.

4. Having found that appellee was negligent in executing and delivering the note and mortgage to Errion, the court erred in not thereby concluding that she should suffer the loss, for when one of two innocent persons must suffer a loss, it must be borne by the one whose conduct rendered the injury possible.

5. The court erred in finding of fact No. 5, Tr. 19, that appellee did not realize she had executed the note and mortgage. This finding is contrary to all the evidence.

6. The court erred in finding of fact No. 7, Tr. 20, that appellants have no legal title to the note and mortgage. This finding is contrary to the judgment in Case No. 3556.

7. The court erred in finding of fact No. 8, Tr. 21, that appellee was not guilty of estoppel in pais.

Questions Involved

1. Whether appellee's judgment for $83,077.49 in Case No. 3556, and which considered the $16,000 note and mortgage as a valid and outstanding lien, is res judicata and a bar to the right of appellee litigating the same issue in this case? Appellants contend that the judgment is res judicata of all defenses.

2. Whether appellants or appellee should bear the loss caused by the wrongful acts of Errion?

Appellants contend that appellee should bear the loss because by her acts and conduct, she made it possible for Errion to defraud appellants.

Summary of Argument

1. Appellee previously filed an action for damages (Case No. 3556) and to cancel certain instruments, including the note and mortgage involved in this appeal. In that case she recovered judgment for the full amount of her loss and included in the judgment was an allowance by way of pecuniary restitution of the value of the note and mortgage of $16,000.

The court cancelled the note insofar as Holdorf Oyster Corporation was concerned, and it did not void it insofar as appellants were concerned. Thus, a merger of appellee's cause of action was effected by her acceptance of the judgment for pecuniary restitution.

This merger by judgment is res judicata as to her claim for cancellation, and she is estopped in this case from obtaining such relief. She did not appeal the judgment in Case No. 3556 and is bound by its terms.

2. Appellee, **prior** to the execution and delivery of the $16,000 note and mortgage, was fully aware that Errion was a scoundrel and swindler. Nonetheless, she hoped to recover from him as much of her property he swindled her out of that she could, even though it necessitated some activity on her part. He represented he had a sale of the property involved in this case whereby she would receive $20,000 cash but he wanted $16,000 for himself. To accomplish this, he agreed with her that Holdorf Oyster Corporation would re-convey the property in consideration of her executing a note and mortgage to it for $16,000, she well knowing that Errion intended to dispose of the note and mortgage. She held out Errion as her agent to sell the property and placed the note and mortgage into his control, knowing it would be transferred to a third person.

Appellee was guilty of negligence or misplaced confidence and under the doctrine of estoppel, where one of two persons must suffer a loss, it must be borne by that one of them who, by his conduct, has rendered the injury possible.

3. In weighing the equities the evidence, without

contradiction, shows that appellee benefitted from the transaction in which the $16,000 note and mortgage was executed.

In 1949 she had already been defrauded by Errion of much property, including the property involved in this case and upon which the court in Case No. 3556 placed a value of $45,000. After repeated demands on Errion she secured a re-conveyance of this property, but only on conditions imposed by him, i.e., that she execute the note and mortgage so that he could realize for himself the sum of $16,000. Thus, she obtained the return of some property having a net value to her of $29,000.

ARGUMENT

I.

The findings of fact and conclusions of law are against the clear weight of the evidence and were induced by an erroneous view of the law.

It is a rule on appeal, that findings of the lower court are clearly erroneous when, although there is evidence to support them, they were induced by an erroneous view of the law. **Stevenot v. Norberg,** 210 F. 2d 615, **Smyth v. Erickson,** (9th), 221 F. 2d 1; **Barry v. Lawrence Warehouse Co.,** (9th), 190 F. 2d 433; **Kaufman-Brown**

Potato Co., v. Long, (9th), 182 F. 2d 594; **West v. Conrad,** C. A. 9th, 182 F. 2d 255.

And, too, a finding is "clearly erroneous" when, although there is evidence to support it, a reviewing court on the entire record is left with a definite and firm conviction a mistake has been committed. **U. S. v. Oregon Medical Soc.,** 72 S. Ct. 690, 343 U. S. 326, 96 L. Ed. 978.

A review of this case supports only one conclusion—appellants and appellee each were victims of the machinations of Errion—thus leaving as the principle issue: Who should bear the loss by reason of his acts?

There are several cogent reasons to find that the judgment of the lower court is clearly against the weight of the evidence and that a mistake has been committed in not holding that appellee should bear the loss.

II.

Res Judicata

The first error is the failure of the court to apply the doctrine of res judicata and merger by judgment.

Incorporated by reference in the Findings of Fact (Tr. 21) in this case, Nos. 9-10, are the complaint, answers of appellants, findings of fact and conclusions

of law, judgment and order of dismissal in Case No. 3556, **Errion et al v. Connell,** 236 F. 2d 447.

Case No. 3556, involved an action by appellee against Errion, et al, including these appellants, for damages together with a prayer for the cancellation of certain instruments, including the $16,000 promissory note and mortgage involved on this appeal. The complaint prayed that the mortgage lien be removed and nullified. Appellee charged Errion, his henchmen, and these appellants, with a conspiracy to defraud her out of many properties.

These appellants were exonerated after the court considered all the evidence and a judgment of dismissal was entered as to them. The court did declare void and cancelled certain instruments, as appears in the judgment, to which this Court is respectfully referred. The judgment cancels the title to the $16,000 promissory note "so far only as the title or interest of Holdorf Oyster Corporation is concerned," thereby recognizing appellants' title thereto.

In Findings of Fact No. 7, (Tr. 20) in this case at bar, however, the court finds that appellants have no legal title to the note and mortgage as they were induced and procured from appellee by the fraud of Errion and Holdorf Oyster Corporation. This finding is incompatible with the findings and conclusions in Case No. 3556,

and results in one court deciding an issue of fact contrary to the decision of another court involving the same parties, the same subject matter and issues.

In the case at bar, as a defense, appellee raised identical issues as were raised and tried in Case No. 3556.

In this case she demands the same relief as was demanded in Case No. 3556. The law is clear, that material facts or questions which were in issue in a former action or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. 30 A. **Am. Jur.** Sec. 371, p. 411. **Stokke et ux v. Southern Pac. Co.,** 169 F. 2d 42 (9th).

We have pointed out appellants were exonerated by the court and findings and a judgment of dismissal as to these appellants were entered. Exhibit 4.

This dismissal, under Rule 41 (b) **Rules of Civil Procedure,** operates as an adjudication upon the merits.

In **Stokke et ux v. Southern Pac. Co.,** supra, defend-

ant's answer in prior action raised defenses based on statute of limitations, contributory negligence, as well as a general demurrer, and defendant was subsequently granted its motion for summary judgment, such summary judgment was res judicata in subsequent suit by same plaintiff against same defendant. The Court said:

> "But here the judgment entered in the earlier case did not merely dismiss the action, on the ground of limitations or otherwise. It was not merely a judgment of non-suit. It was a general judgment in favor of defendant and against the plaintiff, without specifying or even suggesting any particular ground upon which it was predicated. That was the sweep of the judgment and it must be so taken here. It cannot be modified or narrowed in this suit. It may have been correct insofar as the defense of limitations was concerned and erroneous in all other respects. But an erroneous judgment fairly and regularly entered by a court of competent jurisdiction is nevertheless an effective bar under the doctrine of res judicata to a subsequent action between the same parties on the same cause of action."

It is fundamental that an agreement induced by fraud is voidable and not void. 23 **Am. Jur.,** Sec. 19, p. 770; **Baker v. Casey,** 166 Or. 433, 112 P. 2d 1031.

Also, one injured by fraud may elect to accept the situation and recover his damages or he may repudiate the transaction and seek to be placed in statu quo, but

he cannot do both. **Keylon v. Inch,** 35 P. 2d 73, 178 Wash. 522; **Voellmeck v. Harding,** 6 P. 2d 373, 166 Wash. 93, 84 ALR 608; 37 **C.J.S.** Sec. 65, p. 354.

In Case No. 3556, the Court awarded appellee relief by way of pecuniary restitution, because the rights of appellants had intervened, and this award was in lieu of the cancellation of the note and mortgage. Appellee did not appeal from this judgment by way of pecuniary restitution and thereby elected to accept it in lieu of recission.

In Findings of Fact No. 10, in this case at bar, it is admitted that included in the $83,077.49 judgment rendered in Case No. 3556, consideration had been given to the note and mortgage held by appellants in the sum of $16,000, and the further sum of $4,314.68 interest thereon, and this sum was included in the money judgment against Errion, et al.

In computing the amount of the above judgment, it was found that Errion et al, had fraudulently obtained properties of appellee in the total amount of $124,-180.09. From this total amount the court allowed as credit the value of properties restored by him to appellee.

Included in the properties restored was the real property subject to the mortgage involved in this case at

bar and upon which the court placed a valuation thereon at $45,000.00.

In arriving at the amount of the deduction the court took into consideration that the property was subject to the $16,000 mortgage and subtracted this indebtedness together with interest from its valuation of $45,000, Exhibit 4, page 22, paragraph 32.

By virtue of the above judgment the cause of action for fraud committed by Errion, et al, became merged in the judgment.

One of the issues litigated in Case No. 3556 was a claim for cancellation of this note and mortgage owned by appellants. Appellants were exonerated of any charges of fraud and by way of pecuniary restitution to appellee against Errion, the court rendered a judgment against him which included the value of the outstanding promissory note, plus interest. **This has the effect of merging any cause of action relating to the execution and delivery by her of the promissory note and mortgage** into the aforesaid judgment of $83,-077.49, and under the doctrine of res judicata appellee is estopped from relitigating the same issues.

The judgment for pecuniary restitution crystallized the rights of the parties through judicial proceedings and the judgment rendered therein merged the cause

of action into a fixed and final form. In 50 **CJS,** Sec. 599, p. 20, it is stated:

> "A claim or demand which is put in suit and passes to final judgment is merged or swallowed up in the judgment; and this rule applies to a final decree in a court of equity. The judgment extinguishes the original cause of action, which loses its vitality and cannot thereafter be litigated, either as a cause of action or as a set-off or counterclaim, unless a statute otherwise provides; and the rights of the parties are governed by the judgment. Moreover, as a general rule all the peculiar qualities of the claim are merged in the judgment which then stands on the same footing as all other judgments."

Review, also, 30 A. **Am. Jur.** Sec. 313, p. 365.

The doctrine of merger by judgment is particularly applicable to this case. To permit appellee to obtain different relief in this case than she accepted in Case No. 3556, is a superfluous and vexatious encouragement to litigation, injurious to the appellants, and gives appellee double relief. By way of analogy is **Hein v. Chrysler Corporation,** 45 Wash. (2) 586, 277 P. (2) 708, where the court said:

> ". . . By his judicial admission that he will apply any amounts received in payment of the Federal court judgment against Chrysler pro tanto in satisfaction of any judgment rendered in this case, appellant concedes that he is suing Chrysler twice for the same wrongful act. He asks, in effect, to

be allowed to submit his claim for the identical items of damage to two juries on two different legal theories and to retain the benefit of the larger of the two judgments recovered in the two actions. Appellant cites no precedent (and we know of none) which would allow such a procedure."

III.

The Findings are Contrary to the Evidence

A further reason to find the lower court erred and a mistake has resulted therefrom is that the findings of fact are clearly erroneous. In Finding of Fact No. 5, Tr. 19, it is stated:

> ". . . Defendant, Marguerite L. Connell, did not realize she had executed a mortgage on said real property . . ."

The uncontradicted evidence is that prior to the execution and delivery of the note and mortgage she had been swindled out of the property by Errion and it was in the name of Holdorf Oyster Corporation. She needed $20,000 and after making repeated and exasperating demands upon Errion for money it was agreed between them he would have Holdorf Oyster Corporation reconvey the property back to her upon her executing and delivering to it her note and mortgage secured by said property. Thus, there is no evidence to support the finding that she was unaware of the fact she had executed and delivered this mortgage.

In Finding of Fact No. 7, Tr. 20, it is stated:

> ". . . That plaintiffs have no legal title to said note and mortgage as such instruments in the first instance were induced and procured from defendant . . . by fraud practiced upon her by E. R. Errion. . ."

This finding is contrary to the evidence. In Case No. 3556 the court voided the note only in so far as Holdorf Oyster Corporation was concerned. It, therefore, must have concluded that appellants are in fact the owners of the note and mortgage.

In Finding of Fact No. 8, it is stated:

> "That defendant at no time conducted herself by any acts or omissions so as to mislead or prejudice plaintiffs as would estop her from asserting as a defense to said note and mortgage. . ."

This finding is contrary to the clear weight of the evidence and in support of this viewpoint, the Court is respectfully referred to the following disquisition.

IV.

Estoppel in Pais

Another cogent reason for finding that the lower court made a clear mistake and erred, was by not properly applying the doctrine of equitable estoppel or estoppel in pais.

Appellee voluntarily clothed Holdorf Oyster Corpora-

tion and Errion with title and authority over the $16,000 note and mortgage and is estopped to deny such title or authority as against appellants who in ignorance of the true situation relied on such appearance to their prejudice.

Appellee wilfully and intentionally gave control of the note and mortgage to Holdorf Oyster Corporation or Errion pursuant to their agreement, and placed them in a position to defraud appellants in relation thereto, and because her voluntary act facilitated the fraud she should bear the loss. Errion was the agent of appellee.

In **Kiley v. Bugge, et ux,** 165 Wash. 677, 5 P. 2d 1038, defendants, executed, and delivered their note and mortage to Osner & Mehlhorn, Inc., for the purpose of having that corporation pay and cause to be discharged a note and mortgage held by the Metropolitan Life Insurance Company on the property described in the mortgage.

Their negotiations were conducted with Augus Mehlhorn, Jr., secretary of the corporation, to whom they delivered the note and mortgage. The note was payable to the order of Osner & Mehlhorn, Inc.

The original payee, on the 4th day of May, 1929, by a separate instrument assigned the note and mortgage to plaintiff. **The note in question bears no indorsement.**

Plaintiff paid $2,500 for the note and mortgage, and received interest quarterly for one year after the purchase.

Defendants did nothing in connection with the transfer of the note and mortgage by the payee to plaintiff; they knew nothing about the transfer until Osner & Mehlhorn, Inc., went into the hands of a receiver.

The mortgage held by the Metropolitan Life Insurance Company has not been discharged. There was due thereon principal, interest, and penalty in the sum of approximately $2,400.

Plaintiff contends that his mortgage constitutes a lien upon the real estate junior to the mortgage held by the Metropolitan Life Insurance Company.

Defendants insist that there was no consideration for their note and mortgage which they gave to Osner & Mehlhorn, Inc.; that it was given because of the agreement of the original payee to pay and cause to be discharged the note and mortgage held by the Metropolitan Life Insurance Company; and that such agreement was not carried out by the original payee.

It is apparent from the facts that Osner & Mehlhorn, Inc., was the agent of defendants for the purpose of discharging the note and mortgage held by the Metropolitan Life Insurance Company.

Defendants, as was appellee in this case at bar, were guilty of negligence in executing and delivering to Osner & Mehlhorn, Inc., the note and mortgage which were to be used for the purpose of raising money to liquidate the first mortgage because in doing so, they gave Osner & Mehlhorn, Inc., such indicia of ownership that a reasonable man dealing with such agent is reasonably led to believe the agent is the owner of such note and mortgage and where a reasonable man parts with value in reliance thereon, he will be protected even though the true owner is guilty of no more than misplaced confidence.

In reaching the conclusion that even though a holder of a note is not a holder in due course under the negotiable instrument law and takes it subject to defenses, nonetheless, the Court concluded that the rule of **estoppel in pais** was applicable.

> "Where a loss that is occasioned by a wrongful act of a third party must fall upon one of two innocent parties, the one whose conduct made the loss possible must bear it, is a principle long recognized and followed. In the case at bar, the loss occurred because respondents placed in the possession of Osner & Mehlhorn, Inc., a note and mortgage, regular upon the face of the instruments, and duly made, executed, and delivered by respondents. We cannot agree with their position, which is in effect that they may escape liability because these instru-

ments were not used by Osner & Mehlhorn, Inc., as respondents intended they should be . . .

In the case at bar, respondents made, executed, and delivered their note and mortgage to Osner & Mehlhorn, Inc., expecting that the original payee would cause the discharge of the mortgage held by the Metropolitan Life Insurance Company. They did not require from the original payee evidence of the discharge of the prior mortgage. Had this been done by them at any time prior to the time appellant became the assignee of the note and mortgage, neither respondents nor appellant would have suffered any loss. An application of the principle that, where one of two innocent parties must suffer loss from the act of a third, the one whose conduct made the loss possible must sustain it, require that appellant should be permitted to foreclose his mortgage."

In **Clemmons v. McGeer,** 63 Wash. 446, 115 Pac. 1081, plaintiffs were the owners of certain lands in Tacoma, upon which one Bell contracted to erect a house, and was to be paid therefor in part by a conveyance of the lands in controversy. When the building was partly constructed Bell requested a conveyance, representing that the material furnished and work done upon the building amounted to $725, the agreed value of the land involved.

Plaintiff then executed a deed to the land, leaving the name of the grantee blank. Bell was unable to procure receipts for more than $265, showing payment

for the material furnished and work done on the house, and requested plaintiff to leave the deed with him until next morning when he would produce receipts, aggregating $725.

Relying upon this representation plaintiffs left the deed with Bell, who took the deed to McGeer, and negotiated a loan for $650 upon the premises, and inserted in the deed the name of G. M. McGeer as grantee, and delivered it to him as security for the loan.

It was held that the possession of the deed by Bell constituted sufficient implied authority in him to fill in the blank with the name of the grantee, and that the conveyance must be upheld to the extent of McGeer's interest in the land. The Court saying:

> "Now had Bell's name been inserted in the deed at the time it was executed by appellants, and had Bell then conveyed by deed of his own to respondent, clearly respondent would have acquired an interest in the land as an innocent purchaser or mortgagee."

Also, **Nicklesch v. Flynn,** 168 Wn. 310; **Ross v. Johnson,** 171 Wn. 658; **Diimmel v. Morse,** 36 Wn. 2d 344, 218 P. 2d, 344; **Beckmann v. Ward,** 174 Wn. 326; **Tobey v. Kilbourne,** 222 Fed. 760.

In this case at bar, by Finding of Fact No. 8, appellee "was negligent in executing the note and mortgage and delivering such to E. R. Errion."

"Not clearly distinguishable in all situations from estoppel based on negligence is the legal maxim that when one of two innocent persons must suffer from the acts of a third, he who has enabled such third person to occasion the loss must sustain it, a principle upon which many of the cases governing the protection of holders of negotiable or non-negotiable instruments are governed. This is a principle of manifest justice, when confined within its proper limits. It finds difficulty in application with respect to what statements, acts, or conduct of a party sought to be charged can properly be said to have enabled a third person to have occasioned the loss, within its meaning. It applies with most rigor, perhaps, where the carelessness or negligence of the one party has permitted the third party to occasion the loss. It finds most frequent application with respect to the rights of innocent purchasers of lost, stolen, misappropriated, etc., instruments."

8 **Am. Jur.,** Sec. 345, p. 82.

In this case at bar, the evidence shows appellee authorized Errion, as her agent, and as part of a mutual transaction, to sell the real property involved in this suit and it was agreed between them she was to receive $20,000 from the proceeds of the anticipated sale and he was to receive $16,000. (Tr. 47-54).

In pursuance of **this agreement** she freely, knowingly and purposely executed the note and mortgage and delivered it to Errion. Even if it could be assumed

Errion violated his agreement with appellee, or that she had misplaced her confidence in him, nonetheless, under the doctrine of estoppel, a bona fide purchaser of a non-negotiable chose in action from one to whom the owner gave absolute ownership obtains a valid title as against such owner.

It is stated in 19 **Am. Jur.,** Sec. 69, page 699:

> "It may be said, generally, that where the owner of things in action, though not technically negotiable, has clothed another to whom they are delivered in the method common to all merchantile communities, or according to the custom in the locality in which the transfer took place, with the apparent indicia of title, there will be an estoppel against the former in favor of an assignment of the latter for value and without notice. This principle operates generally to protect one who has in good faith purchased or accepted as security for a loan a certificate of corporate stock from one upon whom the real owner had conferred apparent title. Ordinarily, in the absence of statute, estoppel does not arise where the apparent owner obtains possession of the instrument or security by stealing it or where the transfer involves forgery or other criminal acts which the owner was not bound to anticipate, although the rule is otherwise where nothing more than fraud or breach of trust is involved."

Kucher v. Scott, 96 Wash. 317, 165 P. 82, is apposite to the case at bar.

The plaintiffs, being the owners of certain real prop-

erty which was covered by two mortgages, claiming that one of the mortgages was invalid but not knowing which one, brought suit for the purpose of securing the cancellation of the void mortgage, whichever one it might be.

For many years A. Robinson & Co. had been engaged in the real estate, loan and insurance business. All the transactions herein involved were handled by this company through its secretary, Lewis.

Plaintiff purchased from Riley and wife a dwelling house which property was subject to a mortgage held by one Benson. This mortgage and the note which it was given to secure, were made payable to A. Robinson & Co., and by it were transferred to Benson.

It was the custom of that company when making loans, to have the note and mortgage made payable to it and then endorse the note and assign the mortgage to the person advancing the money.

The Benson mortgage was due three years after date or on October 13, 1914. On September 9, 1912, this mortgage was purchased by Scott, the note was endorsed to him and the proper assignment of mortgage placed on record.

Some months prior to October 13, 1914, plaintiff was approached by Lewis with reference to a renewal and after some negotiation on September 1, 1914,

plaintiff and wife executed a note and mortgage payable to A. Robinson & Co., and delivered the same to Lewis.

At this time Lewis had informed plaintiff that he was getting the money from a man who resided in Portland, Oregon, but the name was not disclosed. After the note and mortgage were received by Lewis, the note was endorsed and forwarded to Portland to one of the defendants, Campbell.

Thereafter Campbell drew a check payable to the order of A. Robinson & Co. and forwarded the same to it. Lewis appropriated the money which had been received from Campbell and subsequently committed suicide.

The principle, where one of two or more innocent persons must suffer by the acts of another, he who has placed it in the power of that person to occasion the loss must sustain it, was presented.

In considering this principle of law as applied to the case, the Court said:

> "With this principle of law in mind, the case, so far as it involves the appellant and Campbell, will be first considered. The appellant executed the note and mortgage made payable to A. Robinson & Co., and delivered the same into the possession of Lewis, as secretary of that company. Campbell was requested by Lewis to forward his check

before he received the note of the appellant, but this was not done. The check was not forwarded until the note, properly endorsed, had been received. Campbell had done no act by which he placed it within the power of Lewis to occasion the loss. On the other hand, **the appellant had delivered to him the note and mortgage drawn in such form he could use them in any manner he saw fit. The appellant having placed it in the power of Lewis to commit the wrong is the one that should bear the loss, rather than Campbell."** (Emphasis added)

Appellee cannot be deemed an innocent person for **when she executed and delivered the note and mortgage she was fully aware of Errion's proclivities; she well knew he was a fraud and cheat** and despite this knowledge, she freely, although reluctantly, placed in his hands the $16,000 note and mortgage drawn in such form he could use it in any manner he saw fit.

In this connection, **he did precisely what she and he agreed would be done**—he was to receive $16,000 and she was to have $20,000 when the house was sold. The house was not sold as anticipated but unquestionably her acts and conduct made it possible for him to obtain $16,000 from appellants.

Prior to her association with Errion, appellee had made inquiry of Dr. Kincaid who is connected with the University of Washington as to whether she should transact business with him (Tr. 55-56) and was in-

formed that he was not an honest man and that she should not do business with him.

Appellee had introduced a Mrs. Skene to Errion (Tr. 56-57) and was in constant contact with her between 1949 and 1951 (Tr. 57-58). She regretted having introduced Mrs. Skene to Errion. Appellee was having qualms of conscience **and knew in the early part of 1951** (Tr. 64-65) that Errion and his associates were practicing some type of scheme or fraud upon her and she came to the definite conclusion in 1952 that they were scamps and scoundrels and that she had been taken (Tr. 65).

Appellee's Acts and Conduct

Tr. 42-43

Q. I will ask you, Mrs. Connell, whether or not you recall the following questions being put to you and the following responses made:

"Question: And did either Mr. or Mrs. Holdorf or Mr. or Mrs. Errion ever make any representations at all with respect to Dorothy Glaser and Einar Glaser, Mrs. Connell?

Answer: No, except this. I heard Bob Errion say that he was handling a big logging business, that there were 55 heirs, and among them was a man by the name of Einar. I can't remember, but it must have been a man

by the name of McKinney, and he mentioned some others.

Question: When was that?

Answer: Oh, in 1950 or in early 1951."

Tr. 55

"Question: What did Mr. Errion say to induce you to sign the note down there in Portland? What did he tell you?

Answer: He told me he would put it back in my name and sell it.

Question: Put what back in your name?

Answer: The house I live in. I said, "Why don't you sell it and give me the 20 thousand I want," and he said, "No, it would look better if they get it from an individual person," and he said, "You will pay me 16 thousand, and I will get you 20."

Question: Did he say anything as to whether or not be had a buyer?

Answer: Yes, certainly.

Tr. 45

A. I don't recall that testimony, but that is true.

Tr. 46

Q. Getting back to this $20,000, did Mr. Errion present you with any papers to sign, Mrs. Connell, when he was starting this transaction to sell this house for you and get the $20,000 for you?

A. I am supposed to say yes or no, aren't I?

Q. You can, Mrs. Connell. Go ahead and respond the way it would be most comfortable for you.

Tr. 46

A. For Mr. Errion I suppose I have signed, I don't know—I think maybe it's exaggeration—a thousand papers, but certainly hundreds. He did everything in triplicate, sometimes in quadruplet and sometimes in quintuplets.

Q. And did you have a discussion with him immediately **prior to this transaction being closed whereby you were going to get your property back,** and then he was going to sell it, and you were going to get $20,000? A. Yes.

Tr. 49

Q. Well, so that we have no misunderstanding, **you did realize, Mrs. Connell, that it was perhaps improper to sign this note when it was predated** when you knew that he was going to sell your house to some party, and you were going to get $20,000? A. Yes.

Q. And he was going to get 16 out of the deal which was this note? A. Yes.

Q. But you went ahead, the transaction was consummated anyway? A. I was what?

Q. The transaction was consummated anyway?

A. Yes. **I was concerned about the date,** a year behind.

Q. It was right there at the office that day?

A. Yes, but I didn't see it until it was all done.

Q. Until, you mean, you signed it?

A. I had signed it, and it was all stamped and finished.

Q. The note was still there in the office, was it not?

A. Yes. They were hurrying me to catch a plane. They were going to take me to catch my plane.

Q. **Mr. Errion did explain to you, did he not, this was the method of getting you $20,000 for your house?**

A. Yes.

Th. 65

Question: So that you then knew that Mr. Errion, Mr. Holdorf and Mr. Williamson was practicing some type of scheme or fraud upon you, did you not?

Answer: **I did after possibly 1950.** Well, I came to that definite conclusion in 1952.

Question: So, at least by 1952, you knew pretty well the type of individual Mr. Errion was and the type that Mr. Holdorf was and the type that Mr. Williams was?

Answer: Well, a woman with no more experience than I should never have had anything to do with that kind of people, but it gradually came to me they were scamps and scoundrels.

Question: And that you were being taken?

Answer: That is right."

Tr. 66

Question: **So that by January of 1951,** at least, you had absolutely no reason to doubt but that Mr. Holdorf was also a cheat and a fraud?

Answer: Yes. Yes, the whole crowd together. I rarely saw Bob Errion unless I saw Holdorf because he drove him everywhere."

Q. Is that a true statement of the facts?

A. To the best of my knowledge, yes.

The burden of proof that note and mortgage were invalid is upon appellee. **Morisse v. Salvesen,** 165 Wn 157.

Appellee made it possible for Errion to victimize appellants. Errion, through Holdorf Oyster Corporation, held title to her property and would not reconvey it to her unless she participated in his scheme to sell it subject to a mortgage. She was fully aware of the consequences of executing the note and mortgage but was impelled to go along with his program so she could obtain title, and this conduct on her part was found to be negligent. (Tr. 21). The note and mortgage, good on its face, was voluntarily placed in the control and power of Errion for the purpose of doing what he and appellee agreed should be done. Her acts made it

possible for him to use his "great facilities of persuasion, personal magnetism and irresistable charm," to obtain $16,000.00 from appellants in exchange for her note and mortgage.

CONCLUSION

Taking this case by its four corners a mistake was made by the lower court in evaluating the entire evidence upon an erroneous view of the law. The doctrine of estoppel, that when one of two innocent persons must suffer a loss, it must be borne by that one whose conduct made the injury possible, should be applied against appellee.

The judgment should be reversed and a decree of foreclosure rendered.

Respectfully submitted,

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